Filed 3/19/19 In re Z.K. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re Z.K., a Person Coming Under the Juvenile Court Law.	
INYO COUNTY HEALTH AND HUMAN SERVICES, Plaintiff and Respondent;	E070227
v.	(Super.Ct.No. JVSQ16533)
M. S., et al., Defendants and Appellants.	OPINION

APPEAL from the Superior Court of Inyo County. Dean Stout, Judge. Dismissed.

Jesse Jack McGowan, under appointment by the Court of Appeal, for Defendants and Appellants.

Marshall S. Rudolph, County Counsel, John-Carl Vallejo and Terry Kathleen Walker, Deputy County Counsel for Plaintiff and Respondent.

Z.K. was removed from his mother's custody by Inyo County's social services agency (the Department) at three months of age. The biological father's second cousin, K.D. (the D.'s), immediately expressed an interest in adoption in the event mother did not reunify. Because the D's lived in the State of Washington, the minor was placed in Inyo County with the S.'s (foster parents), who expressed willingness to have a long-term placement of guardianship if mother failed to timely reunify, to give mother an opportunity to regain custody. The concurrent plan for Z.K. was adoption by the D.'s, from the inception of the case.

When mother failed to reunify, her services were terminated and a hearing pursuant to Welfare and Institutions Code, section 366.26[1], was set to select and implement a permanent plan of adoption by the D.'s. The foster parents sought standing as de facto parents and opposed an extended visit of the minor with the D.'s, as well as the proposed designation of the D.'s as prospective adoptive parents. The trial court granted the foster parents de facto parent status, but ordered that the visit would take place, and, after the parents' parental rights were terminated, the court ordered adoption, giving preference to the D.'s as prospective adoptive parents. The foster parents appeal.

On appeal, the foster parents argue that the court (1) erred in deferring the Department's decision regarding the adoptive placement; (2) failed to follow or enforce the caretaker preference for prospective adoptive parent designation; and (3) erred in

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

authorizing the extended visit in Washington pending the placement hearing. They also assert (4) that the decision is appealable. We dismiss the appeal.

BACKGROUND

In August 2016, a social worker with the Department obtained a protective warrant to detain Z.K, who lived with his mother and her boyfriend M.T. in a tent along a canal, after mother called police about a domestic violence incident. A social worker investigating the referral found spoiled food, human and animal feces, and trash, inside and outside the tent. There had been previous incidents in which the mother's boyfriend had grabbed mother's arm, and ran into mother's leg while on his bicycle, and then ran his bicycle into the stroller in which mother was pushing the minor. There were also multiple reports of domestic violence incidents and prior restraining orders, but mother "modified" the restraining order to allow for peaceful contact with her boyfriend.

Mother tested positive for methamphetamine and amphetamine, as well as marijuana. She also had a criminal history involving prior drug offenses and resisting arrest, as well as for making false police reports. C.S., the biological father, also had a drug and arrest record, including a prior arrest for domestic violence. A dependency petition was filed pursuant to section 300, subdivision (b), based on mother's failure to protect the minor by exposing him to multiple instances of domestic violence, her disregard of restraining orders, her failure to provide the child with a safe and sanitary residence, her mental health issues, criminal history and drug use by both parents.

The parents' progress, *vel non*, in services are not relevant to this appeal, because neither parent sought review of the termination of services, nor did they appeal from the termination of parental rights. Suffice it to say at the initial stages of the proceedings the minor was placed in foster care with the S. family, and there were two relatives desirous of placement: father's grandmother, and his second cousin, the D.'s, who lived in the State of Washington. The D.'s had expressed interest in long term placement since September 23, 2016.

At the jurisdictional hearing, the court made true findings and the petition was sustained under section 300, subdivision (b). At the dispositional hearing in October 2016, the court removed custody from mother and placed Z.K. in foster care, with reunification services ordered for both parents. An interim review report filed in December 2016 indicated mother had an established relationship with the caregivers, who provided her with additional support and supervised visits. Mother was working diligently on her plan at that stage. The report also revealed that Z.K. had been assessed as eligible for developmental services through the Regional Center to help with his delays.

Throughout the reunification period the foster parents maintained an open relationship with mother, providing her with additional updates about the minor, and they expressed their desire to support her and play a role in the minor's life if the child were returned to his mother. From early on, Ms. D., the minor's paternal cousin (referred to in some reports as a great-aunt) desired placement of the child with her family, as did the

minor's paternal grandmother. However, because the D. family lived out of state, placement of the child with them at this stage would make reunification, including visitations, difficult for mother. So, the Department placed the child locally with the foster family, and adopted a concurrent plan of guardianship or adoption of the child by the D.'s in the event reunification was unsuccessful. At the review hearing held on March 30, 2017, services were continued for the parents. In May 2017, an assessment was ordered pursuant to the Interstate Compact for Placement of Children (ICPC).

In June 2017, father's services were terminated due to his nonparticipation, but services were continued for the mother, although she had stopped taking her psychotropic medication, causing the re-emergence of negative behavior. In August 2017, the D.'s were approved for placement under the ICPC and the Department filed an ex parte application for an order authorizing out-of-state travel for the minor, with the potential for long term placement with the D.'s, which the court granted. Ms. D. had made a concerted effort to develop a relationship with the minor by traveling to Inyo County to visit him, as well as visiting him regularly via Skype; she had also maintained consistent contact with the agency. The visit occurred between August 28, 2017 and September 6, 2017.

At the 12-month stage, mother had relapsed in her drug use, lacked a stable residence, was not compliant with her psychotropic medications, and had engaged in domestic violence with her boyfriend. The minor was observed to have a healthy relationship with the foster parents, who expressed an interest in guardianship or

adoption, but who also expressed a willingness to maintain a relationship with mother. The foster parents informed the Court Appointed Special Advocate (CASA) worker that their goal was to reunify the mom and child together; that "they were seeking a permanent guardianship so that one day, hopefully in three or four years, the mom would have her act together and he could be returned to her [*sic*] mom."

In September 2017, at the twelve-month review hearing, the court terminated mother's services and set a hearing pursuant to section 366.26. On October 10, 2017, a conference call between the foster family, the social worker, and Ms. D, took place to prepare for transition from the foster home to the D's. Subsequently, the foster family participated in a child and family team (CFT) meeting to assist with transition from the foster home to the D's. On November 17, 2017, the Department submitted an ex parte request for authorization to place the minor with the D. family in the State of Washington, based on the prior ICPC approval, which the court ordered.

On November 27, 2017, the foster parents filed an ex parte application for injunctive relief to prevent the placement[2], sought designation as de facto parents, and requested access to the juvenile court files, pursuant to section 827. In their application, the foster parents asserted they had consistently expressed the desire to become guardians or to adopt should the need arise, alleged they were also distantly related to the minor through the marriage of their son to father's first cousin, and argued the ex parte

[2] Their points and authorities in support of this request relied on section 388. On December 4, 2017, the foster parents submitted a form JV-180 form to modify the prior order pursuant to section 388.

application by the Department violated their right to notice. The court found that the ex parte application for the out of state placement did not conform to the law regarding notice, so it vacated that order, but set it for hearing on shortened time, while also putting over the remaining requests made by the foster parents.

That same date, the CASA worker submitted a report recommending placement with the relatives in Washington, who had expressed interest in adoption as early as 2016. The CASA worker had observed that tensions between the foster parents and the father's relatives had increased to the point that the foster family denied the paternal great-grandmother visitation for the previous two weeks. Additionally, the CASA worker noted that the prospective adoptive relatives had already researched developmental services for the child in Washington and that the minor had done well on his extended visit. Finally, the CASA worker was told by the foster family that they wanted a guardianship to insure the minor has continued contact with his mother.

On November 29, 2017, the foster family submitted a request for prospective adoptive parent designation. On November 30, 2017, the court authorized an extended visit with the minor by the D. family, to run from the day of the minute order through the date of the next hearing.

On December 15, 2017, the court granted the foster parents' application for de facto parent status, and reaffirmed its order granting the prospective adoptive parents, the D.'s, an extended visit, effective forthwith, with the proviso that the child should be returned to California for the section 366.26 hearing. On January 2, 2018, the court

granted the foster parents' attorney access to the juvenile court's file, and granted the foster parents' standing as de facto parents.

On January 16, 2018, the CASA worker submitted a report for the section 366.26 hearing, indicating that she had observed the interaction between the minor and the D.'s, which revealed a happy boy who was comfortable with the D.'s, adjusting well at preschool, and had demonstrated marked growth for development in vocabulary and motor skills. That same date, the foster parents filed numerous kudos attesting to their care of the child and their characters. The foster parents requested that the child be returned to them. The D.'s made a request for prospective adoptive parent designation. The Department recommended adoption by the D.'s.

On January 23, 2018, the section 366.26 hearing took place, and the court terminated the parental rights of both parents. The court then proceeded with the placement hearing, found that the Department did not abuse its discretion pursuant to section 366.26, subdivision (k), and denied the foster parents' request for preference as prospective adoptive parents. The court found that placement with the D.'s was in the child's best interests.

On March 23, 2018, the foster parents appealed.

DISCUSSION

1. *The Issue Regarding the Propriety of the Order for the Extended Visit is Moot.*

The foster parents' seek reversal of the order by the juvenile court authorizing the extended visit of the child in the State of Washington, pending the section 366.26

hearing. However, that visit had been completed prior to the section 366.26 hearing, rendering the issue moot.

"An appeal becomes moot when, through no fault of the respondent, the occurrence of an event renders it impossible for the appellate court to grant the appellant effective relief." (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1054-1055, citing *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315–1316*; Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863.) "An appellate court will not review questions which are moot and only of academic importance, nor will it determine abstract questions of law at the request of a party who shows no substantial rights can be affected by the decision either way." (*In re Esperanza C., supra,* 165 Cal.App.4th at p. 1054.)

Here, the extended visit ended before the section 366.26 hearing began, so even if we were to find error, there is no relief we could provide. The issue is moot.

2. *Appealability of Orders Designating the D.'s as Prospective Adoptive Parents*.

The foster parents' argue that the court erred in designating the D.'s as prospective adoptive parents. In related arguments, they assert that the juvenile court misapplied the law in ignoring the caretaker preference (Former § 366.26, subd. (k))[3], and in giving too much deference to the decision by the Department that the D.'s should be designated as the prospective adoptive parents. However, before we can address any of the foster parents' claims, we must determine if they are appealable.

[3] Effective January 1, 2018, the caretakers preference was redesignated as section 366.26, subdivision (k)(1).

Preliminarily, when a juvenile court terminates parental rights, "the court shall at the same time order the child referred to the State Department of Social Services, county adoption agency, or licensed adoption agency for adoptive placement by the agency." (§ 366.26, subd. (j).) Former section 366.26, subdivision (k) provided that a relative caretaker or foster parent who has cared for a dependent child for whom the court has approved a permanent plan for adoption shall be given preference for adoption *if* the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent *and* removal from the relative caretaker would be seriously detrimental to the child's emotional well-being. (Former § 366.26, subd (k), italics added.)

However, except as provided in subdivision (b) of section 366.28, an order by the court issued after a hearing pursuant to section 366.26, subdivision (n), shall not be appealable, unless certain conditions are met. (§ 366.26 subd. (n)(5).) Section 366.28, subdivision (b)(1) provides that after parental rights have been terminated, an order by the court that a dependent child is to reside in, be retained in, or be removed from a specific placement, is not appealable unless certain conditions are met.

Those conditions include: "(A) a petition for extraordinary writ review was filed in a timely manner; [¶] (B) the petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record; and [¶] (C) the petition was summarily denied or otherwise not decided on the merits." (§366.28, subd. (b)(1)(A)-(C).) The time limit for filing a notice of intent to file a writ petition under section

366.28 is seven days after the post-termination placement order, unless the party was notified of the post-termination placement order by mail. (Cal. Rules of Ct., rule 8.454(e)(4), (5).)

The legislation, including the provision making orders pursuant to section 366.26, subdivision (n), nonappealable, was prompted in part by the case of *In re Harry N.* (2001) 93 Cal.App.4th 1378, where the appeal took 18 months to resolve, at the end of which the child was removed from foster parents and placed with relatives, denying the child the security of a permanent placement for over a year. (*A.M. v. Superior Court* (2015) 237 Cal.App.4th 506, 513, citing Assem. Com. on Judiciary, analysis of Sen. Bill No. 59 (2003–2004 Reg. Sess.) as amended June 11, 2003, p. 1.) In the wake of that legislative act, failure to file a petition for extraordinary writ review within the period specified by rule of court, conforming with the above conditions, precludes review by appeal. (§ 366.28, subd. (b)(2).) The order is non-appealable.

In some circumstances we have discretion to treat an unauthorized appeal as an extraordinary writ. (*A.M. v. Superior Court, supra,* 237 Cal.App.4th at p. 515, citing *Olson v. Cory* (1983) 35 Cal.3d 390, 401.) We may exercise discretion "where all the conditions necessary for issuing a writ of mandate are present, and a refusal to decide the issues raised by an improvident appeal would result in unnecessarily dilatory and circuitous litigation, the court has the power to treat the appeal as a petition for writ of mandate." (*In re Albert B.* (1989) 215 Cal.App.3d 361, 372-373, citing *Olson v. Cory, supra,* 35 Cal.3d at p. 401.)

In *A.M. v. Superior Court, supra*, 237 Cal.App.4th at page 515, the reviewing court noted that the notice of appeal was filed within the statutory time limit for filing a notice of intent to file a writ petition, that the record was adequate for purposes of writ review and the social services agency had responded on the merits without arguing for dismissal of the appeal. (*Id.*, at pp. 515-516.) Thus, timely filing of the notice of appeal, and acquiescence by the agency were factors taken into consideration.

Here, however, all of the conditions necessary for issuing a writ of mandate are not present, because while there is an adequate record, the notice of appeal was filed more than seven days after the order was made, the foster parents were not relative caretakers or designated as prospective adoptive parents at any time, and the foster parents have not established that the child would be detrimentally affected by the change of placement, the substantive issue.

The foster parents were present at the hearing at which the post-termination placement order was made, so the time to file their notice of intent to file a writ petition was limited to seven days, and the Department has argued that the order is nonappealable. Under these circumstances, we will not exercise our discretion to consider the appeal as a petition for extraordinary relief. The appeal must be dismissed.

3. *Were We to Reach the Merits, There was No Abuse of Discretion*

Even if we were to consider the appeal as a writ petition, the outcome would be the same. The crux of the foster parent's appeal is that the court erred in naming the D.'s as prospective adoptive parents, rather than according them caretaker preference pursuant

to section 366.26, subdivision (k). Notwithstanding the nonappealability of the order, we disagree.

"In enacting section 366.26, subdivision (n), the Legislature intended to 'limit the removal of a dependent child from his or her caretaker's home after parental rights are terminated, *if* the caretaker is a designated or qualified as a prospective adoptive parent, in order to "protect the stability and best interests of vulnerable children."'" (*T.W. v. Superior Court* (2012) 203 Cal.App.4th 30, 44 [italics added], citing Assembly Com. on Judiciary, Sen. Bill No. 218 (2005-2006 Reg. Sess.) as amended June 2, 2005, p. 5.) But the foster parents were not designated as prospective adoptive parents, and did not meet the criteria listed in section 366.26, subdivision (n), except for their request for de facto parent status, which was filed *after* the Department had sought approval to place the child with the D.'s.

The statutes grant exclusive authority to the social services agency to make decisions on adoptive placement, as well as temporary care. (*Dept. of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 732-733.) Of course, the agency's discretion is not unfettered. (*In re M.H.* (2018) 21 Cal.App.5th 1296, 1306.) The court retains jurisdiction over the child to ensure that the adoption is completed expeditiously, and that the placement is appropriate. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 72.) The court's determination is reviewed for abuse of discretion. (*In re M.H., supra*, 21 Cal.App.5th at p. 1307.)

The preference accorded by section 366.26, subdivision (k), gives the caretaker or foster parent preference in time for processing the adoption application (§ 366.26, subd. (k)(2)), but it does not necessarily mandate that other applications will not also be considered. (*In re Harry N., supra,* 93 Cal.App.4th at pp. 1396-1397.) Where no prospective adoptive family had been identified prior to the section 366.26 hearing, the court is required to refer the child to the Department for adoptive placement by the agency. (§ 366.26, subd. (j).)

Because the foster parents had not indicated a desire to adopt prior to the time when the Department sought authority to place the child in the home of the D.'s, they had not been designated prospective adoptive parents prior to the 366.26 hearing. As such, the provisions of section 366.26, subdivision (n), pertaining to the criteria for the designation at the 366.26 hearing did not apply. The Department recommended adoptive placement with the D.'s after determining that removal would be in the minor's best interests by securing the permanence of an adoptive home. The Department presented evidence, in the form of its reported observations, along with those of the CASA worker, that removal from the foster parents would not be seriously detrimental to the child's emotional well-being. The court had authority to order the placement.

The court reviewed all the evidence, noted that the child had transitioned easily to the D.'s home during the extended visit, and found that removal of the child would not be seriously detrimental to the child. There was no abuse of discretion.

DISPOSITION

The appeal is dismissed.

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RAMIREZ
P. J.

I concur:

FIELDS
J.

[*In re Z.K.*, E070227]

MENETREZ, J., Concurring.

I agree that the appeal must be dismissed. This appeal is taken from the juvenile court's order entered after the hearing at which the court (1) denied the S.'s request to be designated prospective adoptive parents and (2) removed Z.K. from their care and placed him with the D.'s. Subdivision (n) of section 366.26 of the Welfare and Institutions Code[1] governs a hearing on a request to be designated a prospective adoptive parent, as well as a hearing on an objection to removal of a child from a designated prospective adoptive parent or a caretaker who meets the threshold criteria for such a designation. (§ 366.26, subd. (n)(1) & (3); see also Cal. Rules of Court, rules 5.726, 5.727.) "Except as provided in subdivision (b) of Section 366.28, an order by the court issued after a hearing pursuant to [subdivision (n) of section 366.26] shall not be appealable." (§ 366.26, subd. (n)(5).) Under subdivision (b)(1) of section 366.28, an order "that a dependent child is to reside in, be retained in, or be removed from a specific placement[] is not appealable at any time" unless a writ petition is filed within seven days of entry of the order. (Cal. Rules of Court, rule 8.454(a), (e)(4).) No writ petition has been filed. The notice of appeal was filed 60 days after entry of the order under review, so even if we were to treat the notice of appeal as a writ petition, we would have to dismiss the petition as untimely. Accordingly, the appeal must be dismissed.

[1] All subsequent statutory references are to the Welfare and Institutions Code.

Appellants' arguments to the contrary lack merit. First, appellants argue that the limitations on appealability of an order entered after a hearing under subdivision (n) of section 366.26 do not apply because the juvenile court "expressly refused to conduct a hearing" under subdivision (n). The argument fails because it is based on a misreading of the record. The sole basis for the argument is the court's statement that, in light of all of the evidence and argument presented, it was not "appropriate for this court to find that subdivision (n) [of section 366.26] applies." But the court's next sentence clarified that what the court meant was that it was not appropriate *to designate the S.'s as prospective adoptive parents*, and therefore the protections against removal of a child from a designated prospective adoptive parent do not apply: "I do not think it would be in the best interest of the child, and in the exercise of the court's discretion I decline to designate the current caretaker as the prospective adoptive parent under subdivision (n) [of section 366.26]." The juvenile court received evidence and heard argument on (1) whether the S.'s should be designated prospective adoptive parents and (2) whether Z.K. should be removed from their care and placed with the D.'s. The court ruled on both of those issues. Those proceedings unambiguously constituted a hearing under subdivision (n) of section 366.26, so the statutory limitations on appealability apply.

Second, appellants note that the limitations on appealability under section 366.28 apply only to an order "that a dependent child is to reside in, be retained in, or be removed from a specific placement" (§ 366.28, subd. (b)(1)), and appellants argue that those limitations do not apply here because the court did not make such a placement

order but rather "determined that the *department's* placement decision was not an abuse of discretion." Again, the argument fails because it is based on a misreading of the record. The S.'s objection to Z.K.'s removal from their care and placement with the D.'s was one of the central contested issues at the hearing. The court resolved that issue against the S.'s and ordered Z.K.'s permanent plan is placement with the D.'s with the goal of adoption. The court thereby ordered that Z.K. be removed from the S.'s and reside with the D.'s, so subdivision (b) of section 366.28 applies to the court's order.

For all of the foregoing reasons, I agree that the appeal must be dismissed. Because I respectfully disagree with the court's opinion in various respects, I concur in the judgment only.

MENETREZ

J.